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No. 87-209

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SHERMAN COLLEGE OF STRAIGHT CHIROPRACTIC, *et al.*,
Petitioners,

v.

AMERICAN CHIROPRACTIC ASSOCIATION, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE COUNCIL ON CHIROPRACTIC EDUCATION, INC.

C. COLEMAN BIRD
Counsel of Record
BRUCE R. STEWART
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel for Respondent
The Council on
Chiropractic Education, Inc.

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QUESTIONS PRESENTED

Petitioners' statement of the questions presented materially distorts the District Court's decision in order to find questions worthy of this Court's review. This case presents none of the questions that petitioners claim it presents.

The questions actually presented are:

1. Whether the District Court and the unanimous Court of Appeals below correctly held that the *Noerr-Pennington* doctrine exempted from antitrust liability respondents' petitioning activities that persuaded various state governmental authorities to adopt stricter licensure requirements for the protection of the public against inadequately trained chiropractors.

2. Whether the District Court and Court of Appeals correctly held that petitioners had failed to show respondents' activities had had any anticompetitive effect in any relevant market, and that this failure of proof doomed their antitrust claims.

PARTIES TO THE PROCEEDING AND RULE 28.1 LIST

The petition's caption contains the names of all parties to the proceeding in the Court of Appeals below, the court whose judgment is sought to be reviewed.

As required by Rule 28.1, respondent The Council on Chiropractic Education, Inc., a Wisconsin not-for-profit corporation, states that it has no parent, subsidiary, or affiliated companies.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	iv
COUNTERSTATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
I. The District Court Found No Group Boycott or Horizontal Concerted Refusal To Deal	8
II. The District Court Correctly Found That Petitioners Had Failed To Show an Anticompetitive Effect in Any Relevant Market	10
III. The Courts Below Correctly Applied the *Noerr-Pennington* Doctrine	12
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Berenyi v. District Director, 385 U.S. 630 (1967) .. 12
Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 12
Eliason Corp. v. National Sanitation Foundation, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980) 9
FTC v. Indiana Federation of Dentists, 106 S. Ct. 2009 (1986) 10
Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co., 336 U.S. 271 (1949) 12
National Society of Professional Engineers v. United States, 435 U.S. 679 (1978) 10
NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85 (1984) 10
Sherman College v. United States Commissioner of Education, 493 F. Supp. 976 (D.D.C. 1980) 4
United Mine Workers v. Pennington, 381 U.S. 657 (1965) 13

STATUTES:

Sherman Act, 15 U.S.C. § 1 10

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BRIEF IN OPPOSITION FOR RESPONDENT THE COUNCIL ON CHIROPRACTIC EDUCATION, INC.

Petitioners sought to impose treble-damage antitrust liability on respondents solely because the vast majority of state licensing authorities agreed with respondents that doctors of chiropractic should be adequately trained in diagnosis in order to be licensed to practice their profession. Both the District Court and the Court of Appeals found as a fact that respondents had engaged in no anticompetitive conduct or conspiracy, and that their lawful petitioning activities aimed at establishing licensure requirements that would protect the public

against inadequately trained chiropractors were protected by the *Noerr-Pennington* doctrine. The courts' findings were fully supported by the evidence, and their legal conclusions were entirely consistent with established law. This case thus presents no question warranting review by this Court.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case contains numerous mischaracterizations of the proceedings, record, and judgment below. We will not burden this Court with a detailed rebuttal of these distortions, but instead respectfully invite the Court's attention to the District Court's statement of facts in its opinion below (Pet., pp. 4a-16a), which adequately states the facts material to this Court's consideration of the questions presented.[1] We highlight only the following additional points.

Respondent The Council on Chiropractic Education, Inc. ("CCE") was incorporated in 1971 as an autonomous national accrediting agency for chiropractic education. Its members include 15 of the 17 chiropractic colleges in the United States; only petitioner Sherman College of Straight Chiropractic ("Sherman College") and another antidiagnostic college that has never sought CCE membership are not members. Since 1974 CCE has been recognized as a nationally recognized accrediting agency by the U.S. Office of Education ("USOE") and by its successor the U.S. Department of Education.

CCE's purpose is to establish and promote high standards of quality in chiropractic education. CCE establishes accrediting standards or requirements (called "Educational Standards for Chiropractic Colleges") that

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[1] The District Court based its findings on the record developed at a 10-day trial that involved the testimony of 15 witnesses (live or by deposition) and hundreds of documentary exhibits. After hearing oral argument, the Court of Appeals unanimously affirmed the District Court's decision in a *per curiam* opinion.

colleges must meet in order to be eligible for CCE accreditation. These minimum standards relate to the college's curriculum, faculty, library, physical facilities, laboratories, instructional aids and equipment, and a host of other areas that bear on the quality of the professional educational program offered by the college. CCE's Commission on Accreditation, an independent unit within CCE, applies CCE's standards to those chiropractic colleges that ask to be evaluated by it.

Since at least 1964, the accreditation standards of CCE and its predecessor organization have included the requirement of adequate diagnostic training. Petitioners repeat in this Court their outrageous charge that CCE's standards regarding diagnosis were "financially, not educationally, motivated" in order to allow practitioners to "perform more patient services and therefore increase revenue." (Pet., p. 14.) There is no evidence whatsoever to support this charge. Instead, the evidence establishes that the purpose of the requirement is to protect the public from the health risks posed by the practice of chiropractic by practitioners with inadequate diagnostic skills. These risks arise because there are numerous serious or life-threatening conditions (such as various aggressive forms of cancer) that produce symptoms similar to the symptoms of spinal misalignment. If a chiropractor commences chiropractic treatment without performing diagnostic tests sufficient to detect these abnormalities and thus fails to refer the patient for prompt medical treatment, the patient's condition may deteriorate because of the delay in getting appropriate treatment.

CCE is representative of a broad spectrum of the chiropractic profession. CCE does not represent only the so-called "mixer" segment of the profession, nor does it exclude or oppose the so-called "straight" segment,[2] as

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[2] Contrary to petitioners' misleading terminology, the controversy between the antidiagnostic viewpoint and the mainstream diag-

those terms are generally understood. It excludes from accreditation status only those institutions that do not measure up to its minimum standards in any respect, including the requirement of adequate diagnostic training.

CCE accreditation is entirely voluntary, and not a prerequisite for the organization or operation of a chiropractic college. The accrediting activities of agencies such as CCE help prospective students by identifying those educational institutions whose programs have been assessed and found to be directed toward the preparation of competent professionals and by facilitating transfers among various professional schools. They also help the general public choose among practitioners by identifying those programs that are judged to be effective in the preparation of professionals who are adequately trained for practice in the profession. Accreditation is particularly important in the health care professions, because proper training of health care professionals is vital to public health, safety, and welfare.

In 1974, CCE urged the Federation of Chiropractic Licensing Boards ("FCLB") (a non-profit corporation whose members include chiropractic licensing boards of

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nostic viewpoint is not a controversy between "straight" and "mixer" views of chiropractic, because the "straight" vs. "mixer" controversy concerns the scope of treatment, not the role of diagnosis. It is only petitioners and their antidiagnostic adherents (aptly termed a "deviant splinter group" in *Sherman College v. United States Commissioner of Education*, 493 F. Supp. 976, 981 (D.D.C. 1980)) who define "straight" chiropractic to include antidiagnostic chiropractic and nothing else. The best evidence that traditional "straight" chiropractic is not antidiagnostic is that the accrediting standards of the accrediting agency sponsored by the International Chiropractors Association, the largest organization of straight chiropractors, were virtually identical to CCE's standards regarding diagnosis. The District Court correctly found that the dispute between petitioners and the mainstream of the profession concerned diagnosis and diagnostic training. (Pet., pp. 4a-6a.)

the various states and the individual members of such boards) to adopt a resolution urging various state licensing boards to require that all applicants for licensure after a certain date have graduated either from a chiropractic college having status with CCE's Commission on Accreditation or from a college meeting equivalent standards. CCE urged various state board members to contact the attorneys general of their respective states for advice on proper implementation of the FCLB resolution.

In urging this public policy upon the various state chiropractic licensing boards, CCE had no purpose whatsoever to restrain or injure Sherman College or any antidiagnostic college. Every chiropractic college in the United States at that time (including petitioner Sherman College) either had status with CCE, had an application pending for status, or had submitted a letter of intent to apply for status. Sherman College itself was proclaiming to CCE as late as 1976 its commitment to the CCE standards concerning diagnosis, and even stated in its own catalogue that it was complying with all of CCE's accreditation requirements and expected to be accredited by CCE within the minimum allowable time.

In October 1976, Sherman College apparently changed its mind about diagnosis. It withdrew its letter of intent to seek status with CCE and began a campaign to persuade individual state licensing boards to permit its graduates to become licensed, notwithstanding its lack of status with CCE. These efforts set the stage for a vigorous public policy debate in a number of states and before the USOE concerning whether adequate diagnostic training should be required as a condition of chiropractic licensure. Petitioners' sole complaint in this Court, as below, is that in most of the states they lost this debate. Respondents did no more than engage in proper petitioning activities genuinely designed to achieve the public policy results that respondents were urging: restriction of licensure to persons with adequate diagnostic training,

or, in the case of USOE, its continued recognition of CCE.

Petitioners' lengthy catalogue (Pet., pp. 9-17) of alleged wrongs purportedly committed by various respondents during the course of this public policy dispute need not be considered. The District Court correctly found that the only actions of respondents that had an adverse impact on petitioners were the respondents' successful petitioning of state governmental officials and bodies to restrict licensure to persons with adequate diagnostic training. (Pet., p. 31a.) At the trial below, petitioner Sherman College based its entire damage claim on its graduates' inability to become licensed in more than twelve states because of state licensing boards' policy decisions. The District Court's finding in this regard was unchallenged by the College in the court below.

REASONS FOR DENYING THE WRIT

This case presents none of the questions that petitioners have alleged. Petitioners' tactical ploy, both in this Court and below, has been to ignore the findings of fact actually made by the District Court (and affirmed by the Court of Appeals), and to assume instead that the District Court had resolved all disputed issues of fact in their favor. Petitioners then attack as error the lower courts' refusal to apply settled legal principles to facts that the District Court never found.

Petitioners contend that the District Court found that respondents were dominant horizontal competitors that had been engaged in an explicit group boycott, a concerted refusal to deal with petitioners that was intended to exclude them as competitors. Thus, the petition bristles with references to respondents' "explicit combination to eliminate the petitioners from the profession of chiropractic education and limit consumer choice regarding available services" (Pet., p. i), to a "horizontal agreement among dominant competitors to exclude other

competitors from the market through predatory conduct" (*id.* at ii), to "a private conspiracy among professionals to eliminate competition with respect to services provided to consumers, precluding consumer choice with respect to alternative services" (*id.*), and to an "intentional agreement not to offer, or allow others to offer, 'straight' chiropractic to consumers" (*id.* at 34). Petitioners' constant refrain is the alleged "boycott" of "colleges like Sherman." (*See, e.g., id.* at 21, 23, 24.) Petitioners also claim that the District Court's decision "expressly states that defendants [respondents] had both market dominance and control of essential elements—national testing and accreditation." (*Id.* at 26.)

Petitioners next contend that the District Court excused respondents' purportedly clear-cut antitrust violations because it erroneously concluded that petitioners had failed to prove the requisite anticompetitive effect. Petitioners claim that the District Court reached this erroneous conclusion for two reasons: first, because "although petitioners would be eliminated from the market, the conspirators . . . would continue to compete among themselves" (*id.* at i; *see also id.* at 24), and, second, because there had been an increase (*id.* at 31-32) or at least no decrease (*id.* at 34) in the number of competitors. Finally, petitioners argue that the District Court compounded its error by extending *Noerr-Pennington* protection to CCE's allegedly "exclusionary accreditation standards" (*id.* at 35) purportedly because "state boards or legislatures subsequently refer[red] to the conspirators' private standard setting organization in rules or statutes." (*Id.* at iii.)

Petitioners' argument misstates and distorts every significant holding of the District Court. As a result, the questions that petitioners claim this case presents are abstract, hypothetical questions that lack the slightest connection with the reality of the decision and record below.

I. The District Court Found No Group Boycott or Horizontal Concerted Refusal To Deal.

The District Court never found that respondents had engaged in a group boycott or a horizontal concerted refusal to deal, or any explicit combination to eliminate competition. The court's other findings preclude such a finding, because none of the respondents competes with any other respondent in any market. There is no market in which an accrediting agency for chiropractic colleges (CCE), a national professional association of chiropractors (ACA), a national testing agency for the chiropractic profession (NBCE), and the president of a chiropractic college (Dr. Williams) compete with each other. For this reason, respondents could not have engaged in a horizontal group boycott or concerted refusal to deal, and the District Court made no such finding.

The District Court found instead that respondents had similar views on the importance of adequate diagnostic training as a prerequisite for licensure to practice chiropractic, and communicated these views to state governmental officials by means of petitioning activities that never went "beyond petitioning through appropriate channels." (Pet., p. 54a.) State legislatures and licensing authorities responded by adopting statutes or regulations that required adequate diagnostic training and denied licensure to applicants—from Sherman College or elsewhere—who lacked such training. Thus, the only "boycott" involved in this case was no boycott at all, but merely the refusal of some 39 state licensing bodies, in the exercise of their regulatory authority, to license graduates of Sherman College. The courts below correctly held that the *Noerr-Pennington* doctrine protected respondents from antitrust liability for such governmental action. (*See* pp. 12-14 below.)

Petitioners contend that CCE's "exclusionary" standards in and of themselves were the hallmark of the alleged group boycott. This is a perversion of the term

"boycott." It is an essential part of the purpose and operation of every accrediting agency or other standard-setting organization to adopt reasonable standards and to refuse to certify that a college (or product or service) meets the agency's standards when it has failed them. In this sense (and only this sense) CCE's accreditation standards and the standards of other standard-setting organizations are necessarily "exclusionary" because all standards necessarily exclude those colleges, products, or services that fail to measure up.

Petitioners' contend that CCE's adoption and application of its standards constituted an unlawful horizontal boycott simply because Sherman College failed or refused to meet the CCE standards. This claim runs squarely contrary to established authority. *See, e.g., Eliason Corp. v. National Sanitation Foundation*, 614 F.2d 126 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980) (rejecting claim that standard-setting organization's denial of seal of approval to product that failed to meet its standards constituted group boycott). The record below established that CCE's standards were not unreasonably exclusionary but were reasonably related to the promotion of educational quality and to the protection of the public. (R19-984-91.) If petitioners' theory were correct, and a plaintiff could recover antitrust treble damages merely by showing that an accrediting agency or other standard-setting organization had decided that the plaintiff had not measured up to its standards, private accreditation and other beneficial standard-setting activities would be eliminated. Nothing in antitrust jurisprudence requires wholesale condemnation of such long established, widespread, and valuable pro-competitive activities.[3]

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[3] Petitioners' related claim that the District Court found that respondents possessed "market dominance" (Pet., pp. 20, 26) rests upon a transparent distortion of the record. The District Court found that the "*pro-diagnostic* forces have achieved dominance in the profession." (*Id.* at 6a; emphasis added.) Because this finding is the next sentence after the District Court's discussion of the

II. The District Court Correctly Found That Petitioners Had Failed To Show an Anticompetitive Effect in Any Relevant Market.

The District Court below found as a fact that petitioners had failed to show that respondents' activities had had an unreasonable anticompetitive effect in any relevant market. Because, as petitioners appear to concede, the *per se* rule is inapplicable to this case,[4] the District Court's well-supported finding of fact dooms petitioners' antitrust claims. Petitioners' failure to prove an anticompetitive effect required rejection of their antitrust claims, because it is well settled, as the District Court recognized (Pet., pp. 18a-19a), that the Sherman Act, 15 U.S.C. § 1, "was intended to prohibit only unreasonable restraints of trade," *NCAA v. Board of Regents*, 468 U.S. 85, 98 & n.17 (1984), citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-89, 691 (1978) (Rule of Reason inquiry

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philosophical differences between petitioners and respondents, it is clear from the context that the court was referring to the dominance of the pro-diagnostic philosophy in the profession. Petitioners then tamper with the court's finding by substituting "[defendants]" for the court's words "the pro-diagnostic forces" to make it seem that the court had found that respondents had market dominance. The court made no such finding, however.

[4] Although petitioners' contentions on this point are far from clear (*see* Pet., pp. 24-26), it appears that they have abandoned in this Court their claim below that respondents' activities were illegal *per se* and that as a result they were not required to show an actual anticompetitive effect in a relevant market. In any event, such a claim is foreclosed by this Court's recent decision in *FTC v. Indiana Federation of Dentists*, 106 S. Ct. 2009 (1986), upon which petitioners heavily rely. This Court's rejection of the *per se* rule in that case, which involved a direct horizontal agreement among competing members of the dental profession that resembled a group boycott, requires rejection of the rule in this case, which has no horizontal agreement or boycott whatsoever. Each of the factors relied upon by this Court in rejecting the application of the *per se* rule in *Indiana Federation of Dentists*, 106 S. Ct. at 2017-18, applies with equal or greater force here.

concerns "whether the challenged agreement is one that promotes competition or one that suppresses competition").

Petitioners again distort the District Court's decision in their attack on the court's explicit finding that they had failed to prove an unreasonable anticompetitive effect in any relevant market. They claim that the court below so held merely because pro-diagnostic chiropractors and chiropractic colleges continued to compete among themselves. This was not the basis of the District Court's finding, however.

Although petitioners failed at trial to define what relevant markets had allegedly been restrained (Pet., pp. 16a-17a), the District Court analyzed the effects of respondents' alleged anticompetitive activities in two separate markets: chiropractic education and chiropractic health care services. (*Id.*)

With respect to the chiropractic education market, the District Court correctly held that petitioners had presented no evidence of diminished competition in that market. (*Id.* at 18a.) This finding immediately followed a paragraph in which the court pointed out that there were both antidiagnostic and prodiagnostic chiropractic colleges which, the court assumed, competed with each other in order to attract and hold tuition-paying students. (*Id.*) The court correctly held that there was no evidence of diminished competition, either among chiropractic colleges generally or between the pro- and anti-diagnostic groups. Students were and are perfectly free to choose whether they wished to attend an antidiagnostic college or a diagnostic college, knowing that if they chose the latter they would have to take additional courses in diagnosis. Sherman College's lagging enrollment compared to increasing enrollments at diagnostic colleges hardly establishes a diminution of competition but is instead evidence of competition at work.

It is not surprising that students choose mainstream diagnostic colleges rather than antidiagnostic colleges.

The District Court also found "that the evidence does not preponderate in favor of a finding of unreasonable anti-competitive effect" in the chiropractic services market. (Pet., p. 25a.) The basis for the Court's holding in this regard had nothing to do with the continuation of competition among the alleged conspirators. The District Court's explanation set forth immediately after this finding focused on the impact on the consuming, patient public of CCE's increased educational requirements and correctly found a complete absence of evidence that CCE's standards had coerced patients into purchasing unwanted diagnostic services or had increased the cost of chiropractic services to patients. (*Id.* at 25a-26a.) The Court noted that there was also no evidence that chiropractors who believed in diagnosis had sufficient power in the patient market to coerce the purchase of unwanted diagnostic services or to increase prices. (*Id.*)

The District Court's findings are clearly correct and were unanimously affirmed by the Court of Appeals below. Under this Court's "two-court" rule, the Court " 'cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' " *Berenyi v. District Director*, 385 U.S. 630, 635 (1967), citing *Graver Tank & Mfg. Co., Inc. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). No showing of error, obvious or otherwise, has been made here, and these findings compelled the District Court to enter judgment against petitioners.

III. The Courts Below Correctly Applied the *Noerr-Pennington* Doctrine.

Perhaps petitioners' greatest distortion of the decision below is their claim that the District Court extended *Noerr-Pennington* protection [5] to the development of the

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[5] The *Noerr-Pennington* doctrine takes its name from two cases (*Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*,

CCE standards themselves "merely because state boards or legislatures subsequently refer[red] to the conspirators' private standard-setting organization in rules or statutes." (Pet., p. iii.) This is utterly false, because the District Court never held that *Noerr-Pennington* protection extended to private standard-setting activities. Instead, the District Court applied the *Noerr-Pennington* doctrine only to respondents' petitioning of governmental officials, to respondents' "political lobbying when they persuaded state legislators and administrative boards to bar graduates of anti-diagnostic colleges from licensure." (*Id.* at 29a.) In the District Court's first mention of the *Noerr-Pennington* doctrine and every later reference, the Court made it clear that the only protected activities were respondents' petitioning of state officials:

> [Petitioners'] claims also fail for another reason. As previously noted, those states which have excluded graduates of anti-diagnostic institutions from becoming licensed chiropractors have done so either by legislative or administrative act. [Respondents'] activities in persuading these official state bodies to so act are immunized from liability under the *Noerr-Pennington* doctrine . . . .

Id. at 26a. Nowhere in its opinion did the District Court ever suggest that it was extending *Noerr-Pennington* protection to petitioning aimed at CCE's standards-development process, either because CCE's standards were relied on by governmental agencies or for any other reason.

Petitioners' lengthy argument is thus addressed to an issue that is simply not present in this case.[6]

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365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965)) that first established the exemption from antitrust liability for collective petitioning of governmental officials.

[6] Petitioners criticize the District Court for considering whether the "sham" or "public co-conspirator" exceptions to *Noerr-Pennington* protection applied to the case (Pet., p. 37), but fail to

The District Court correctly held that *Noerr-Pennington* protection for respondents' petitioning of governmental officials disposed of the petitioners' claims, because only these activities had any impact on, or caused any injury to, petitioners. (Pet., p. 31a.) There was therefore no need to consider whether *Noerr-Pennington* protection extended to other activities that had had no impact on petitioners.

CONCLUSION

This case turns on its unique facts, and is controlled by the application of settled legal principles to the correct and unchallenged findings of fact made by the District Court after a lengthy trial, and unanimously affirmed by the Court of Appeals.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

C. COLEMAN BIRD
Counsel of Record
BRUCE R. STEWART
PEPPER, HAMILTON & SCHEETZ
1300 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 828-1200
Counsel for Respondent
The Council on
Chiropractic Education, Inc.

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mention that those were the principal arguments petitioners raised in the courts below in their effort to have the court deny *Noerr-Pennington* protection to respondents' petitioning activities.